Supreme Court, U.S.
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No. 01-1874

In The

Supreme Court of the United States

JUANA VARGAS-HARRISON,

Petitioner,

v.

RACINE UNIFIED SCHOOL DISTRICT, DENNIS McGOLDRICK, JOHN PELEJ, and PATRICIA STEPHENS-ROGERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE ISSUES PRESENTED

Whether Petitioner, as the chief administrator of her school and a policy-making employee of Respondent School District, could be subject to demotion for engaging in speech critical of her supervisors' policies without implication or violation of her First Amendment rights?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to this action are those named in the caption. None of the parties is a non-governmental corporation requiring disclosure pursuant to Rule 29.6 of this Court.

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STATEMENT OF THE CASE

The November 11, 1999 opinion of the United States District Court for the Eastern District of Wisconsin, included in Petitioner's Appendix (34a-72a), focused on the content of Petitioner's speech prior to her transfer to a vice-principal position; the February 9, 2001 Decision and Order addressed more specifically the policy-maker issue upon which the Petition is based. Pet. App., 17a-33a. Respondents suggest the summary of facts provided by the Court of Appeals is the most convenient explanation of the circumstances and events relevant to the Petition. Pet. App., 2a-7a. Respondents do not challenge any of the facts recounted in the opinions.

CLARIFICATION OF RECORD

Respondents submit that this case, as stated in Petitioner's presentation of the issues, Pet. App., 1, revolves around whether Petitioner was a "policy-maker" as that status is defined by decisions subsequent to *Pickering v. Board of Education*, 391 U.S. 503, 888 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). Because much of Petitioner's Statement of the Case describes the school where Petitioner was principal, not her function as its leader and spokesperson *vis-a-vis* the Respondent School District and its highest managers, Respondent offers this summary of the facts demonstrating her policy-making status.

Petitioner Vargas-Harrison was the principal and highest administrator of the Gilbert Knapp Elementary School in Racine, Wisconsin. Like all Racine principals, she was the "representative of the Board and the Superintendent" who "implements the curriculum approved by the

Board" and "working with the staff, determines the organization structure of the building for instructions and assigns staff . . . accordingly," Pet. App., 20, discussing District Policy 2213c, ¶4, R.48. She had authority and discretion in the context of the school's organizational status, dealt with faculty selection, supervision, and evaluation, and controlled development of the school's curriculum and instructional methodology, *Id.*, 20.

An important duty of the principal at Knapp was the development of the school's application for a P-5 Program grant, one of the Wisconsin Educational Opportunity programs designed to subsidize assistance to minority and economically disadvantaged youth and adults, Wis. Stats., §115.28(23). Work on this grant application is to be accomplished through a community-developed specialty program which must include in its formulation the participation of parents, teachers, administrators, and neighbors of the school. *Id.*, §115.45(4)(g)1.

Each school is to develop and propose its own P-5 program, and in Racine that responsibility was assigned to the principal, Pet. App., 2a-3a. The School District viewed this program as both an educational opportunity for its students and a team-building opportunity for the larger school communities, as the statute mandated that the proposed plan "encourage and increase parental involvement in efforts to improve the quality of education." Wis. Stats., §115.45(4)(g)2.

Rather than use the Knapp P-5 proposal as a vehicle to improve the District's relations with teachers and their union, Petitioner introduced a totally new and different program which dramatically shifted funds away from teaching positions. The local teachers' union – as should

have been obvious to Petitioner – strongly objected to this change and the job losses it would engender, causing the District's Curriculum and Instruction ("C&I") Committee to reject her proposal. Pet. App., 3a.

Vargas-Harrison would not accept her supervisor's subsequent direction to collaborate with union officials, parents, and the school community in development of a new proposal which did not antagonize the union. Petitioner failed to participate in the meetings to create a new plan; rather, she pressed on with her original proposal. *Id.* When a group of teachers and parents, organized pursuant to the statute, reached consensus on a new proposal, Petitioner not only rejected their effort, but failed to attend their meetings as requested by District officials, and then spoke against their proposal at a public meeting of the C&I Committee. *Id.*, 3a-4a

Although the District superintendent's highest officers and the elected Board members wanted a proposal sponsored by Knapp's teachers, parents and administrators, Vargas-Harrison would not support that effort even after repeated direction that she do so. Instead, she told a public meeting of the C&I Committee that the new proposal was flawed, offered copies of her own plan as a preferred alternative, and thus attacked both her superiors and her teachers, the people with whom she was supposed to be developing a constructive relationship. By saying it "was time to let the principal do the job and stop the union running the school," Vargas-Harrison not only opposed, but actually undermined the collaboration which the District was seeking to develop. *Id.*

In total disregard of the District's determination to work with the teachers' union and the school's community,

Vargas-Harrison had contradicted the policy she had been directed to support and, in so doing, damned the faculty, the very people with whom every principal must work every day. Because of this, she was assigned a vice-principal position in a different school, with no loss of pay or benefits; this move would allow Knapp to recover from this confrontation and allow Petitioner to learn how to collaborate with the people she was to serve. Vargas-Harrison never went back to work, exhausted all of her accumulated paid and unpaid leave, and, some twenty months later, was notified that her failure to report for work over this extended period constituted a termination of the employment relationship.

REASONS FOR DENYING THE WRIT

As a policy-making employee of the School District, Vargas-Harrison was subject to correction for publicly opposing her supervisors' goals, plans, and directions. While *Pickering v. Board of Education*, 391 U.S. 563, 889, at 1731, 888 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), generally protects a public employee's right to free speech, it also requires a balancing of that right with the employer's interest in an efficient work place. *Pickering* provided no protection when the "position in public employment in which the relationship between supervisor and subordinate is of such a personal and intimate nature that certain forms of public criticism of the supervisors by the subordinate would seriously undermine the effectiveness of the working relationship between them . . . " *Id.*, Fn. 3.

BECAUSE SHE WAS A "POLICY-MAKING EMPLOYEE," VARGAS-HARRISON WAS PROPERLY SUBJECT TO HER EMPLOYER'S NEGATIVE RESPONSES WHEN SHE PUBLICLY OPPOSED ITS DIRECTIONS AND POLICIES

There is no disagreement that Vargas-Harrison was a "policy-making employee." She was the highest administrative officer in her school, both the person responsible for its relationship with its faculty and community, as well as the officer assigned to use the P-5 proposal process as a vehicle to collaborate with those groups in the development of a grant application in which they all would share a sense of interest and commitment. Instead, Vargas-Harrison created a confrontation by unilaterally proposing a program which placed faculty employment positions at risk, causing serious opposition from the teachers' union with which she was supposed to cooperate. When this proposal was rejected, Petitioner declined to participate in meetings with teachers, union officials, and community members, disobeyed her supervisors' instructions that she support a more traditional grant application, and then publicly opposed both the new P-5 proposal and the labor relations policy she had been directed to accept and promote. This attack on the teachers' work, their union's activities, and her own supervisors' instructional and labor relations policies inevitably "would seriously undermine the effectiveness of the working relationship" she needed to maintain with the District's superintendent's office and board members.

Petitioner's extended and pointed opposition to the union-supported traditional P-5 program certainly reduced her effectiveness in dealing with her own faculty. More important in this context, her conduct also embarrassed

her superiors, making it most difficult to continue her principalship at Knapp if they were to be taken seriously in their efforts to cooperate with the teachers' union. The tension such conduct created was a significant barrier to efficiency at both the school and District levels of Petitioner's working relationships.

The basic rule is well-grounded in principle as well as precedent. In the patronage cases this court always excepted public contradictions by high level administrators from its prohibition of public employees being dismissed because of political affiliation with the opposing party. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990); thus, "support of patronage is the need for political loyalty of employees . . . to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Elrod v. Burns*, 427 U.S. 347, 366, 96 S. Ct. 226, 49 L. Ed. 2d 547 (1976).

Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980), did not change this, but held the employer had the burden of proof in demonstrating that "an employee's private political beliefs would interfere with the discharge of his public duties, [so that] his First Amendment right may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." 445 U.S., at 507, citing *Elrod*, 427 U.S., at 375. Every form of political administration must be able to depend on its cabinet and policy-makers to be a supportive part of its team; the alternative is the absurdity and paralysis which would occur "if every employment decision became a constitutional matter." *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). This

empowerment of required consistency at the higher levels of a management team is reflected, for example, in the acknowledgement of the legitimate need for "an elected union president to select his own administrator [which] is an integral part of ensuring a union administration's responsiveness to the mandate of the union election," *Finnegan v. Leu*, 456 U.S. 431, 441, 102 S. Ct. 1867, 72 L. Ed. 2d 239 (1982) (local union president may dismiss predecessor's appointed business agents and choose his own staff without violating "rights of union members to freedom of expression," 456 U.S. 435).

Petitioner contends that the decisions of the United States Court of Appeals for the Seventh Circuit somehow pervert these very realistic elements of the *Pickering* balance. As the panel below wrote:

> "In essence, we have determined that, with respect to these employees, the Pickering analysis regularly will result in a determination that 'the government employer's need for political allegiance from its policy making employees outweighs the employee's freedom of expression to such a degree that it obviates Pickering balancing.' *Bonds v. Milwaukee County*, 207 F. 3d 969, 977 (7th Cir. 2000)." Pet. App. 9a.

Warzon v. Drew, 60 F. 3d 1234 (7th Cir. 1995) and *Wilbur v. Mahan*, 3 F. 3d 214, 219 (7th Cir. 1993) simply state the same principle excepted from *Pickering* in its third footnote: "The First Amendment does not prohibit the discharge of a policy-making employee when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors on their stated policies." Pet. App., 9a.

Vargas-Harrison does not present some bizarre or attenuated extreme of the principle preserved from challenge by *Pickering* and its progeny. This was a principal who was authorized and instructed to develop a curriculum proposal which both assisted her students and enlisted support from her teachers. Instead, Petitioner jeopardized teachers' jobs, attacked their union, and disobeyed her supervisors. She turned what should have been a collaboration into a bitter confrontation and a challenge to the authority of those Board and administration members it was her job to support. "When [what should have been] close working relationships . . . essential to fulfilling public responsibilities" are disrupted this much, "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking [termination] action." *Connick v. Myers, supra*, at 151-152.

A policy-making employee has a different level of responsibility than someone who has no "input" toward ultimate decision making. By District regulation and by actual conduct, Vargas-Harrison was clearly in a position which "authorizes, either directly or indirectly, meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation." *Nekolny v. Painter*, 653 F. 2d 1164, 1170 (7th Cir. 1981), Pet. App., 10a. As the person authorized to develop and present the P-5 grant application in a manner which enlisted union support, she had obvious "input into government decision making." In turning that project from a collaboration into a confrontation, she engaged in the very sort of insensitive, disruptive disobedience which this court excepted from First Amendment protections in

Connick, *Elrod*, and *Pickering* itself. The Seventh Circuit did not go off on some tangent or detour from precedent; it merely applied this court's definitional principles to the undisputed facts of this case. Vargas-Harrison went too far beyond her permissible discretion, and she was rightfully limited for doing so.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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REPONDENTS' APPENDIX

Wis. Stats. 115.28(23) Wisconsin educational opportunity programs. Administer Wisconsin educational opportunity programs on a statewide basis to assist minority and economically disadvantaged youth and adults in pursuing higher education opportunities. The statewide programs shall consist of all of the following:

(a) A talent search program which shall provide information to youths and adults about postsecondary education and counseling to aid pupils in defining educational goals, applying and enrolling in postsecondary institutions and obtaining financial aid.

(b) A talent incentive program which shall provide supplemental aid to financially needy pupils to promote attendance at postsecondary institutions.

(c) An early identification program which shall provide services to pupils under s. 115.44.

(d) The minority group pupil scholarship program under s. 115.43.

* * *

Wis. Stats. 115.45 Grants for preschool to grade 5 programs. (4) The school board receiving an award under this section shall ensure that the schools or private service providers identified under sub. (2)(a) comply with all of the following requirements:

(a) Each identified school or private service provider shall provide structured educational experiences for 4-year-old pupils. The structured educational experiences

shall focus on the needs of low-income pupils and shall include activities that encourage early skill development.

(b) Each identified school or private service provider shall annually test the pupils enrolled in grades 1 to 5 in reading, language arts and mathematics using tests approved by the department.

(c) Each identified school or private service provider shall implement a multidisciplinary team approach to the identification and remediation of problems of pupils with significant needs.

(d) Each identified school or private service provider shall restrict class size in all grades below the 6th grade to no more than 25 pupils for each teacher.

(e) The principal of each identified school and the administrator of each identified private service provider shall annually prepare a written performance evaluation of each staff member providing services under this subsection.

(f) All administrative and instructional staff in the elementary grades of each identified school or private service provider shall participate in in-service training that focuses on educational practices and policies identified by the department as effective in improving pupil achievement.

(g) Each identified school shall:

1. Establish a council composed of teachers, parents of pupils enrolled in the schools district, school board members and community leaders to monitor and make recommendations to the school board concerning the school's educational programs.

2. Develop plans to encourage and increase parental involvement in efforts to improve the quality of education.

(h) Annually, each identified school or private service provider shall report to the state superintendent all of the following:

1. the results of the tests under par. (b).

2. the number and content of in-service training activities under par. (f).

3. the number and content of parental involvement activities and the number of parents attending each activity.